NO. 84580-8

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

---

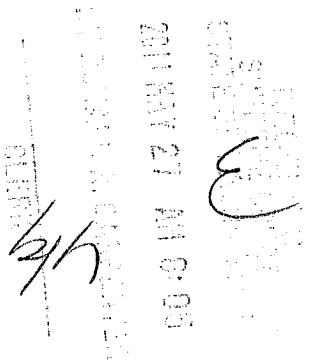
STATE OF WASHINGTON,

Petitioner,

v.

ROBERT BREITUNG,

Respondent.



---

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable Thomas J. Felnagle, Judge

---

# SUPPLEMENTAL BRIEF OF RESPONDENT

---

JENNIFER J. SWEIGERT
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 East Madison
Seattle, WA 98122
(206) 623-2373

## TABLE OF CONTENTS


Page

A. ISSUES ..... 1

B. STATEMENT OF THE CASE ..... 1

C. ARGUMENT ..... 3

1. BREITUNG'S CASE IS DISTINGUISHED FROM STATE V. GRIER BECAUSE THERE IS NO INDICATION HIS ATTORNEY CONSULTED WITH HIM ABOUT WHETHER TO REQUEST JURY INSTRUCTIONS ON LESSER INCLUDED CHARGES. ..... 3

2. THIS COURT SHOULD AFFIRM THE COURT OF APPEALS AND PROVIDE THE RELIEF SUGGESTED IN STATE V. MINOR BECAUSE BREITUNG WAS NEVER NOTIFIED HE COULD NOT OWN A GUN. ..... 7

a. Providing a Remedy Is Consistent with this Court's Decision in *Minor* and with Legislative Intent. ..... 7

b. Breitung Was Prejudiced Because He Detrimentally Relied on the Misleading Lack of Notice. ..... 9

c. The Court of Appeals Appropriately Implied a Remedy to Protect the Right to Bear Arms and Implement the Legislature's Intent. ..... 11

D. CONCLUSION ..... 144

## TABLE OF AUTHORITIES

Page

WASHINGTON CASES

In re Rights to Waters of Stranger Creek
77 Wn.2d 649, 466 P.2d 508 (1970) ..... 7

Riehl v. Foodmaker, Inc.
152 Wn.2d 138, 94 P.3d 930 (2004) ..... 7

State v. Bashaw
169 Wn.2d 133, 234 P.3d 195 (2010) ..... 6

State v. Breitung
155 Wn. App. 606, 230 P.3d 614 (2010) ..... 3, 8, 9

State v. Carter
127 Wn. App. 713, 112 P.3d 561 (2005) ..... 10

State v. Cienfuegos
144 Wn.2d 222, 25 P.3d 1011 (2001) ..... 4

State v. Duncan
146 Wn.2d 166, 43 P.3d 513 (2002) ..... 11

State v. Grier
171 Wn.2d 17, 246 P.3d 1260 (2011) ..... 1, 3, 4, 6

State v. Leavitt
107 Wn. App. 361, 27 P.3d 622 (2001) ..... 9

State v. Minor
162 Wn.2d 796, 174 P.3d 1162 (2008) ..... 1, 7, 8, 9

State v. Moore
121 Wn. App. 889, 91 P.3d 136 (2004) ..... 9

State v. Parker
102 Wn.2d 161, 683 P.2d 189 (1984) ..... 5, 6

## TABLE OF AUTHORITIES (CONT'D)


Page

State v. Rupe
115 Wn.2d 379, 798 P.2d 780 (1990) ..... 6

State v. Thomas
109 Wn.2d 222, 743 P.2d 816 (1987) ..... 1

State v. Workman
90 Wn.2d 443, 584 P.2d 382 (1978) ..... 5

State v. Young
22 Wash. 273, 60 P. 650 (1900) ..... 5, 7

FEDERAL CASES

Boyd v. United States
116 U.S. 616, 6 S. Ct. 524, 532, 29 L. Ed. 746 (1886) ..... 13

Mapp v. Ohio
367 U.S. 643, 81 S. Ct. 1684, 6 L. Ed. 2d 1081 (1961) ..... 11, 12

Roe v. Flores–Ortega
528 U.S. 470, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000)). ..... 4

Strickland v. Washington
466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)) ..... 4

Weeks v. United States
232 U.S. 383, 34 S. Ct. 341, 58 L. Ed. 652 (1914) ..... 11

RULES, STATUTES AND OTHER AUTHORITIES

Former RCW 9.41.047 ..... 8

RCW 9.41.047 ..... 1, 2, 7, 9, 10, 12, 13

U.S. Const. Amend. IV ..... 11, 12

A. ISSUES

1. Under State v. Grier,[1] was Breitung's constitutional right to effective assistance of counsel violated when his attorney pursued an "all-or-nothing" strategy and the record contains no indication Breitung was aware he was entitled to have the jury instructed on lesser offenses?

2. Under State v. Minor[2] and RCW 9.41.047, did the Court of Appeals properly reverse Breitung's conviction for unlawful possession of a firearm because the predicate offense court failed to notify him he could no longer lawfully exercise his right to bear arms?

B. STATEMENT OF THE CASE

The Pierce County prosecutor charged respondent Robert Breitung with two counts of second-degree assault and one count of unlawful possession of a firearm after two witnesses claimed he pointed a gun at them. CP 1-2; RP[3] 301-03, 345-46. Breitung denied having a gun and explained he merely held up the barrel of the microscope he had been using to clean his hearing aids. RP 418-19, 423.

---

[1] State v. Grier, 171 Wn.2d 17, 20, 246 P.3d 1260 (2011)

[2] State v. Minor, 162 Wn.2d 796, 803, 174 P.3d 1162 (2008).

[3] There are seven volumes of Verbatim Report of Proceedings. Volumes one through six are consecutively paginated and referenced as RP. Volume seven is referred to by date as 1/5/09RP.

Ossie Cook and Richard Stevenson drove down the dead-end gravel road where Breitung and his girlfriend lived and continued around the concrete block barriers at the end. RP 364. Breitung was employed to provide security for a neighboring business owner because there had been a problem with thefts in the past. RP 469-71. Breitung's girlfriend told him she had seen Cook and Stevenson only minutes before at a nearby smoke shop and was concerned she was being followed. RP 227.

Breitung testified he went out to the road with his microscope lens, which he held up while gesticulating and yelling at the car to stop. RP 418-23. He asked what the problem was and told the men they should leave because they were scaring his girlfriend. RP 424. Cook and Stevenson claimed Breitung aimed a gun at them and threatened to kill them. RP 301-04, 345-46. When police arrived to investigate, Breitung readily admitted owning several guns, but denied having any of them when he confronted Cook and Stevenson. RP 46-47, 165, 242, 424-25.

The trial court denied Breitung's motion to dismiss the unlawful possession of a firearm charge, which was based on the assertion that neither the predicate conviction nor the plea statement notified him, as required by RCW 9.41.047, that the conviction made it unlawful for him to posses a firearm. RP 381-82; 1/5/09RP 13; Exs. 6, 7. The jury was instructed on second-degree assault and unlawful possession of a firearm. CP 27, 28, 34.

The record contains no discussion of instructions for lesser-included offenses.

The Court of Appeals reversed Breitung's convictions. State v. Breitung, 155 Wn. App. 606, 621-22, 230 P.3d 614 (2010). The Court concluded trial counsel violated Breitung's right to effective assistance of counsel by failing to request jury instructions on the lesser-included offense of fourth-degree assault. Id. at 618. The court also reversed the unlawful possession of a firearm conviction because the predicate offense court violated the statute requiring it to notify Breitung he had lost his constitutional right to bear arms. Id. at 624. This Court granted the State's petition for review.

C. ARGUMENT

1. BREITUNG'S CASE IS DISTINGUISHED FROM STATE V. GRIER BECAUSE THERE IS NO INDICATION HIS ATTORNEY CONSULTED WITH HIM ABOUT WHETHER TO REQUEST JURY INSTRUCTIONS ON LESSER INCLUDED CHARGES.

This Court recently held in State v. Grier, 171 Wn.2d 17, 20, 246 P.3d 1260 (2011), that an attorney was not ineffective in choosing an "all-or-nothing" strategy of not requesting jury instructions on lesser-included offenses. But this Court also explained that, "[i]neffective assistance of counsel is a fact-based determination that is 'generally not amenable to per se rules.'" Id. at 34 (citing State v. Cienfuegos, 144 Wn.2d 222, 229, 25 P.3d

1011 (2001) and Strickland v. Washington, 466 U.S. 668, 691, 696, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). This Court pointed out, "Not all strategies or tactics on the part of defense counsel are immune from attack. 'The relevant question is not whether counsel's choices were strategic, but whether they were reasonable.'" Grier, 171 Wn.2d at 33-34 (quoting Roe v. Flores–Ortega, 528 U.S. 470, 481, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000)). In this spirit, Breitung points out the following relevant distinctions between this case and Grier.

Breitung's counsel was ineffective in failing to request jury instructions on lesser-included offenses because Breitung's counsel did not engage in a reasoned decision to forego instruction on lesser-included offenses after consultation with Breitung. Unlike Grier's attorney, Breitung's attorney did not affirmatively withdraw a previous request for lesser-included instructions. Grier, 171 Wn.2d at 26-27. There is no indication Breitung's attorney considered this option.

As a result, there is no evidence Breitung ever had the opportunity to decide personally whether to risk an all-or-nothing strategy. "Even where the risk is enormous and the chance of acquittal is minimal, it is the defendant's prerogative to take this gamble, provided her attorney believes there is support for the decision." Id. at 39. But Breitung was not afforded this prerogative. This Court explained its decision in Grier reasoning, "Thus,

assuming that defense counsel has consulted with the client in pursuing an all or nothing approach, a court should not second-guess that course of action." Id. (emphasis added). Based on the record in this case, no such assumption can be made.

Counsel's unreasonable performance in failing to request instruction on a lesser-included offense was prejudicial because Breitung's own testimony was evidence of the lesser offense and courts should not speculate about what the jury would have done. See State v. Parker, 102 Wn.2d 161, 163-64, 683 P.2d 189 (1984). More than 25 years ago, this Court reiterated a then 80-year-old holding that when a defendant has been wrongly deprived of jury instructions on a lesser-included defense, "it is not within the province of the court to say that the defendant was not prejudiced." Id. at 163 (quoting State v. Young, 22 Wash. 273, 276–77, 60 P. 650 (1900)). Nor should courts "speculate upon probable results in the absence of such instructions." Parker, 102 Wn.2d at 164 (quoting Young, 22 Wash. at 276-77). The court summarized the state of Washington law on this issue: "This court has adhered to this test and has never held that, where there is evidence to support a lesser-included-offense instruction, failure to give such an instruction may be harmless." Parker, 102 Wn.2d at 164 (citing State v. Workman, 90 Wn.2d 443, 584 P.2d 382 (1978)). Under Parker, counsel's

error that resulted in wrongfully depriving Breitung of jury instructions on the lesser-included offense cannot be harmless.

Parker is consistent with this Court's recent decision in State v. Bashaw, 169 Wn.2d 133, 234 P.3d 195 (2010), that courts do not speculate as to what a jury would have concluded if different instructions were given. In Bashaw, the jury was incorrectly instructed it could answer "no" to a special verdict only if the jury unanimously answered no, rather than if the jury was unable to reach a unanimous verdict. Id. at 146-47. This Court explained the result was a "flawed deliberative process" and that the result of that flawed process "tells us little about what result the jury would have reached had it been given a correct instruction." Id. at 147. Similarly, the result the jury arrived at when given only one option tells us little about the result it would have reached if properly instructed on the lesser-included offense.

In Grier, this Court came to the opposite conclusion from the Parker court, and declared that because we presume the jury would not have convicted unless the State had met its burden of proof, the failure to instruct on lesser offenses was harmless. Grier, 171 Wn.2d at 43-44. However, since the court had already determined Grier's counsel had not rendered deficient performance, conclusions about prejudice were dicta. See, e.g., State v. Rupe, 115 Wn.2d 379, 407, 798 P.2d 780 (1990) ("Dictum is a

statement not essential to the determination of the issue of the case."). Moreover, the court failed to apply principles of stare decisis and explain why the extant precedent of Parker and Young was both harmful and incorrect before abandoning it. See, e.g., Riehl v. Foodmaker, Inc., 152 Wn.2d 138, 147, 94 P.3d 930 (2004) (quoting In re Rights to Waters of Stranger Creek, 77 Wn.2d 649, 653, 466 P.2d 508 (1970)).

Breitung requests this Court affirm the Court of Appeals' reversal of his assault convictions for ineffective assistance of counsel. His counsel was ineffective in failing to consider lesser-included instructions and offer Breitung the opportunity to choose his level of risk. Additionally, the Court of Appeals correctly determined that this failing could not be harmless because we cannot speculate about what the jury would have done had it been differently instructed.

2. THIS COURT SHOULD AFFIRM THE COURT OF APPEALS AND PROVIDE THE RELIEF SUGGESTED IN STATE V. MINOR BECAUSE BREITUNG WAS NEVER NOTIFIED HE COULD NOT OWN A GUN.

a. Providing a Remedy Is Consistent with this Court's Decision in *Minor* and with Legislative Intent.

In balancing the right to bear arms with the perceived need to curb gun violence, the Legislature enacted former RCW 9.41.047(1), which required the court to notify an offender convicted of certain crimes that the conviction renders the offender ineligible to possess a firearm. State v.

Minor, 162 Wn.2d 796, 803, 174 P.3d 1162 (2008). This case squarely presents the question left open by this Court's decision in Minor: "whether failure to comply with former RCW 9.41.047(1) alone warrants reversal." Breitung, 155 Wn. App. at 621-22 (quoting Minor, 162 Wn.2d at 804 n.7).

While the question remains open, the slate is not entirely blank. This Court stated in Minor that the statute is "unequivocal in its mandate" that courts give notice. 162 Wn.2d at 803. Incongruously, the Legislature provided no specific remedy in the statute. This Court fashioned a remedy in Minor primarily because, "[t]he presence of a notice requirement shows the legislature regarded such notice of deprivation of firearms rights as substantial." Id. at 803.

The failure to provide notice is equally substantial in this case. As the Court of Appeals noted, "The legislature's failure to specify a remedy permits sentencing courts (and the State) to ignore the statute's mandatory directives with impunity." Breitung, 155 Wn. App. at 624. To fail to provide a remedy when the statute is violated would render the statute meaningless. Id. This obviously troubled the Minor Court, which held, "Relief consistent with the purpose of the statutory requirement must be available where the statute has been violated." 162 Wn.2d at 803-04. Breitung requests this Court affirm the Court of Appeals in granting that relief.

b. Breitung Was Prejudiced Because He Detrimentally Relied on the Misleading Lack of Notice.

Reversing Breitung's conviction is consistent with Minor, State v. Leavitt, 107 Wn. App. 361, 372, 27 P.3d 622 (2001), and State v. Moore, 121 Wn. App. 889, 896-97, 91 P.3d 136 (2004), where courts reversed on due process grounds when the defendant was affirmatively misled. Breitung's predicate conviction and plea statement listed other constitutional rights he was losing, without mentioning the right to bear arms. Exs. 6, 7. This created a reasonable assumption that the list of rights he lost was complete and his right to bear arms remained intact. See Moore, 121 Wn. App. at 896-97 (combination of statements and omissions implied the only rights lost were the ones the judge mentioned). The failure to mention the right to bear arms in this context was affirmatively misleading.

Indeed, the very existence of RCW 9.41.047 renders the lack of notice misleading. Someone who investigated the law could reasonably conclude that, had he lost his right to bear arms, he would have been notified as required by law. Given the misleading nature of omitting the required notice, this Court should hold that violation of the notice statute is reversible error unless the State can show that actual notice occurred. The State cannot do so in this case.

Breitung was prejudiced by the violation of RCW 9.41.047 because the record contains no indication he received actual notice in the intervening time. The State asserts there is no prejudice and cites State v. Carter, 127 Wn. App. 713, 721, 112 P.3d 561 (2005). Petition for Review at 15-16. But the State ignores Carter's intervening conviction, which gave him actual notice he could not possess firearms, thereby effectively erasing any possibility of prejudice. Carter, 127 Wn. App. at 721.

In contrast, there is no indication Breitung was ever notified that his predicate conviction caused him to lose his right to bear arms. Breitung's predicate conviction was for a misdemeanor domestic violence offense, not a felony or a firearms offense that one perhaps could assume would take away the right to bear arms. Exs. 6, 7. And unlike Minor, who showed a gun to a friend and told her to lie about seeing it, Breitung never displayed any hint of awareness that his possession of guns might be unlawful. See Minor, 162 Wn.2d at 799.

On the contrary, the record shows Breitung relied on the lack of notice to his detriment. During the investigation of this incident, Breitung blithely volunteered information about his possession of not just one gun, but several. RP 47, 52, 165. This candid act of self-incrimination led to the conviction at issue here. The Court of Appeals' decision is consistent with precedent because Breitung was actually misled.

c. The Court of Appeals Appropriately Implied a Remedy to Protect the Right to Bear Arms and Implement the Legislature's Intent.

Like the exclusionary rule in the context of unconstitutional search and seizure, this case involves tension between a constitutional right and other fundamental policy concerns. As in the search and seizure arena, this Court should imply a remedy to protect constitutional rights.

In search and seizure law, "The policy concerns for police safety are in tension with the constitutional guarantees of personal privacy." State v. Duncan, 146 Wn.2d 166, 176, 43 P.3d 513 (2002). There were concerns with the adoption of the exclusionary rule that it provided a windfall to guilty defendants by excluding probative evidence; many worried that "the criminal is to go free because the constable has blundered." Mapp v. Ohio, 367 U.S. 643, 659, 81 S. Ct. 1684, 6 L. Ed. 2d 1081 (1961).

But our high court determined this was the price that had to be paid to give teeth to the Fourth Amendment prohibitions on unreasonable search and seizure that protect all citizens. The Mapp court explained that the "praiseworthy" efforts of courts to bring the guilty to justice "are not to be aided by the sacrifice of those great principles established by years of endeavor and suffering which have resulted in their embodiment in the fundamental law of the land." 367 U.S. at 648 (quoting Weeks v. United States, 232 U.S. 383, 393, 34 S. Ct. 341, 58 L. Ed. 652 (1914)). Those great

principles require exclusion of evidence when the Fourth Amendment is violated because, "The criminal goes free, if he must, but it is the law that sets him free. Nothing can destroy a government more quickly than its failure to observe its own laws." Mapp, 367 U.S. at 659. Without the judicially implied remedy of suppression, the Fourth Amendment would have been reduced to a "'form of words.'" Id. at 648.

While RCW 9.41.047 may not rise to the stature of the Fourth Amendment, the same concerns that warranted adoption of the exclusionary rule also warrant a remedy here. This case involves a similar tension between the maxim that ignorance should not excuse illegal conduct and the enforcement of constitutional rights to due process and to bear arms. As in Mapp, the need for the government to protect its fundamental principles and follow its own laws outweighs the concern for the occasional windfall to an individual defendant.

Without a remedy to enforce RCW 9.41.047, the statute is "reduced to a form of words" and the right to bear arms is threatened. Mapp, 367 U.S. at 638. The Legislature apparently recognized the potential chilling effect on the right to bear arms. Absent proper notification, all persons convicted of even a minor infraction will question whether their right to bear arms remains intact. Citizens should be able to exercise this significant civil right without fear unless they have been notified to the contrary by a court of law.

"It is the duty of the courts to be watchful for the constitutional rights of the citizen and against any stealthy encroachments thereon." Boyd v. United States, 116 U.S. 616, 635, 6 S. Ct. 524, 532, 29 L. Ed. 746 (1886). The Legislature reasonably placed on the court the burden of determining when a conviction results in the loss of the right to bear arms and providing notice. Without the required notice, the very evil the statute aims to prevent, a "stealthy encroachment" on the right to bear arms, comes to pass.

For the vast majority of citizens, possession of a firearm is not just permissible conduct but a right enshrined in the United States and Washington constitutions. The lack of a remedy for violation of RCW 9.41.047 obviates the legislative intent, renders the statute meaningless, and creates a chilling effect on the constitutional right to bear arms. Breitung therefore asks this Court to affirm the Court of Appeals in imposing a remedy and reversing his conviction.

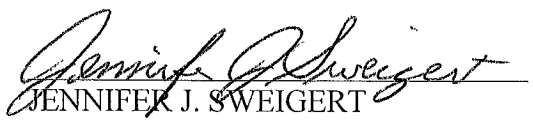
D. CONCLUSION

For the foregoing reasons, Breitung asks this Court to affirm the Court of Appeals.

DATED this 26th day of May, 2011.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



JENNIFER J. SWEIGERT
WSBA No. 38068
Office ID No. 91051

Attorney for Appellant

# IN THE SUPREME COURT OF THE STATE OF WASHINGTON

| | | |
|---|---|---|
| STATE OF WASHINGTON | ) | |
| | ) | |
| Petitioner, | ) | |
| | ) | |
| vs. | ) | NO. 84580-8 |
| | ) | |
| ROBERT BREITUNG, | ) | |
| | ) | |
| Respondent. | ) | |

## DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 26TH DAY OF MAY 2011, I CAUSED A TRUE AND CORRECT COPY OF THE **SUPPLEMENTAL BRIEF OF RESPONDENT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] THOMAS ROBERTS
PIERCE COUNTY PROSECUTING ATTORNEY
930 TACOMA AVENUE SOUTH
ROOM 946
TACOMA, WA 98402

[X] ROBERT BREITUNG
7616 320TH STREET S.
ROY, WA 98580

**SIGNED** IN SEATTLE WASHINGTON, THIS 26TH DAY OF MAY 2011.

x Patrick Mayovsky